179 (3)

Supreme Court, U.S.
FILED
JAN 4 - 2011
OFFICE OF THE CLERK

No. 10-682

IN THE

Supreme Court of the United States

RBC CAPITAL MARKETS, LLC
(F/K/A RBC CAPITAL MARKETS CORPORATION),

Petitioner,

v.

LEONARD SCHNEIDER, LESLIE SCHNEIDER,
SCOTT SCHNEIDER, SUSAN SCHNEIDER,
AND HIGHLAND CAPITAL MANAGEMENT, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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Pursuant to Rule 15.6 of this Court, Petitioner RBC Capital Markets, LLC (f/k/a RBC Capital Markets Corporation) ("RBC") respectfully submits its Reply Brief, addressed to Respondents Leonard Schneider, Susan Schneider, Leslie Schneider and Scott Schneider's (collectively, "Respondents") Brief in Opposition to the Petition for Certiorari, as follows.

REASONS FOR GRANTING THE PETITION

Granting certiorari in this case would provide this Court with an opportunity to provide guidance to appellate courts and remind them of the protections afforded to jury verdicts by the Seventh Amendment. It is evident that appellate courts around the country have loosened the standard of review mandated by this Court in order to upend jury verdicts with which they simply disagree. This Court should eliminate any confusion that these appellate courts have about their proper role in such post-verdict review. The framers simply did not intend appellate judges to be the ultimate fact-finders.

This case is particularly appropriate for review because the panel went beyond the traditional standard of review and created a new one to obtain the result the panel desired. In doing so, the panel impermissibly reexamined facts, drew inferences against the non-movant, ignored credibility determinations made by the jury and credited impeached testimony. Acknowledging that it was possible that an agreement could have occurred, the panel instead decided it did not. The ruling shows a total disregard for the jury as well as a lack of deference to the District Court's role as "front-line" overseer.

This is also an opportune case to grant certiorari because it not only provides the Court an opportunity to clarify and reaffirm the primacy of the jury's fact-finding, but would also allow the Court to resolve the uncertainty that the panel's decision has created regarding the enforceability of oral agreements for the sale of securities. As set forth in the Petition, billions of dollars trade daily based on oral agreements on "size" and "price" of securities – most through securities brokers. The panel's ruling would potentially allow any principal to dishonor oral trades made by an agent that the principal subsequently determined were not in its favor and would, at minimum, slow down the trading of securities while the counterparty obtains specific assurances of a broker's authority.

I. The Panel Substituted Its Judgment For That Of The Jury, Ignored The Seventh Amendment And Usurped The Jury's Constitutional Role

A. The Panel Created And Applied A New Standard Of Review That Violates The Reexamination Clause And This Court's Precedents

1. As demonstrated in the Petition, the panel did not, as Respondents would have this Court believe, merely apply the traditional standard in reviewing a district court's denial of a Rule 50 motion as set forth in the precedents of this Court. If it had, it would have been required to affirm the lower court's denial of the Rule 50 motion because there was sufficient evidence to support the jury's finding that defendants had breached an agreement to sell the securities. (Pet. 14-16, 24-28.)

2. Instead, the panel adopted a new standard — "we may not disregard undisputed evidence that bears on the interpretation of ambiguous matters" (Pet. App. 17a) — which signaled its departure from the expected role of an appellate court and its invasion of the constitutionally protected province of jury verdicts guaranteed in the Reexamination Clause. As applied by the panel, supposedly "undisputed evidence" — namely, the self-serving testimony of Respondents regarding nonpublic information in their possession and transcripts of earlier phone calls — trumped all the evidence that supported the jury verdict.

3. Nor is this a case where an appellate panel simply misapplied the law. As shown below, after noting its disagreement with the jury's findings at oral argument, the panel articulated the new standard in a way to allow it to substitute its judgment for that of the jury while appearing to pay lip service to its role as an appellate court. (Pet. 3-4, 17-19, 21.) Tellingly, Respondents fail to even address this standard in their opposition brief. Like the panel, they deliberately choose to ignore what they cannot explain.

B. RBC Did Not And Could Not Have Waived The Arguments Presented Here

1. Respondents contend that certiorari would be inappropriate because RBC supposedly waived the arguments that the panel applied an incorrect standard and violated the Seventh Amendment and this Court's precedents in the process. Respondents, however, fail to explain how RBC could have guessed that the panel would fashion a new standard or entirely disregard the

jury's findings. Indeed, in setting forth the standard of review in the Joint Appellees' Brief, RBC and Highland expressly stated that the appellate panel was not permitted to weigh the credibility of witnesses or otherwise consider the weight of the evidence. (Joint Appellees' Br. 22.) When it became apparent that the panel had engaged in impermissible fact-finding, RBC immediately raised the issue of the panel's violation of the appropriate standard of review and the Seventh Amendment in its petition for rehearing. (RBC Reh'g Br. 1, 3-5, 11-12.)[1] If Respondents' "waiver" argument were accepted, and an appellee would have to anticipate that an appellate court would reevaluate the evidence and discount the jury's verdict, this Court would never have the opportunity to review appellate court determinations that improperly overturn jury verdicts.

2. The waiver argument is especially curious given that the Second Circuit opinion revived an argument the *Respondents* had themselves waived. At oral argument, members of the panel explicitly recognized that Respondents had failed to argue in their appellate brief that the evidence was insufficient to support the jury's verdict. After Judge Leval stated that he believed there was a failure of proof on the issue of whether there was a meeting of the minds (Reply App. 4a-6a, Sept. 22, 2009 Oral Arg. Tr.) — foreshadowing the opinion by the panel disagreeing with the jury's verdict — Judge Raggi stated to Respondents' counsel "that is not an argument

1. Even if the issue had not been presented below (it was), this Court is not precluded from deciding such issues where consideration of the issue would serve the interests of judicial administration. *Cf. Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

you've made . . . I don't know how anyone would . . . understand from your brief that you were challenging the sufficiency of the evidence . . ." (Reply App. 7a.) Neither side could or did anticipate that the panel would create a new benchmark that would allow the court to question a jury verdict supported by evidence adequate under the prevailing standards.

C. The Panel Ignored The Evidence Of Authority Which The Jury And The District Court Found Sufficient, Ignored the Jury's Credibility Determinations And Made Improper Inferences Against RBC

1. In the opposition, Respondents spend much of their time setting forth their own version of the facts and attempting to downplay both the credibility determinations made by the jury and the improper inferences made by the panel. This one-sided recitation merely serves to highlight the fact-intensive nature of the underlying dispute and the importance of not having appellate courts second-guess the jury's decision. Recognizing the inherent animus of the appellate courts to the work of the jury, the framers adopted the protections of the Seventh Amendment for this very reason.

2. The jury's conclusion that Rauch was authorized was wholly appropriate. So found the District Court, giving proper deference to the jury. Not so the panel – it disregarded evidence that Rauch had made firm offers for the Notes on behalf of Respondents in dealing with RBC (including an offer to sell the Notes at 51 cents on March 12 after speaking with the Schneiders and *after*

they had received the non-public information); that it was industry custom and practice for brokers, like Rauch, to enter into binding agreements on behalf of their clients through such firm offers; that Respondents directed that RBC communicate with defendants only through Rauch; and that Respondents were impeached regarding their denials of Rauch's authorization to enter into a transaction to sell the Notes. (*See* Pet. 14-16, 28.) Indeed, contrary to Respondents' statement, Respondents were impeached on evidence relating to authority. For example, Leonard Schneider was impeached related to the signing of the Letter Agreement, and he admitted that Rauch's post-March 14 statements were false. (Tr. 821-23, 842.) Yet the panel expressly relied on this impeached testimony in reaching its conclusions.

3. As is clear from a transcript of the oral argument in the Second Circuit, the panel disagreed with the jury's central finding that there was a breach based on its review of a limited number of recorded conversations and Respondents' testimony about the material non-public information they had received. (Reply App. 4a-6a.) This selection and review of a limited portion of the record, however, is precisely what the panel was prohibited from doing under the Seventh Amendment — reexamining facts presented to the jury and simply disregarding or rationalizing evidence that did not correspond with its conclusion. Mislabeling facts as "undisputed" does not trump the Reexamination Clause, and the panel's new standard is simply wrong.

4. The panel also made improper inferences, based on certain of the recorded calls and the nonpublic

information, that Rauch did not have authority and that RBC could not reasonably have concluded that there was an agreement. (Pet. 20-21, 24); (*see, e.g.*, Pet. App. 19a-20a). Accordingly, this Court's admonition in *Railroad Co. v. Stout*, 17 Wall. (84 U.S.) 657 (1874), prohibiting appellate courts from drawing inferences in favor of the losing party is directly on point: "[w]e are not called upon to weigh, to measure, to balance the evidence, or to ascertain how we should have decided if acting as jurors." *Id.* at 663; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). Yet that is precisely what the panel did here.[2]

5. As explained in the Petition, the jury's findings were also fully supported by the evidence of what happened after the agreement on the sale was reached on March 14. (Pet. 12, 19.) In response, Respondents claim that the evidence of RBC's conduct after the untaped call shows only that RBC *thought* there was a deal. (Opp'n 15.) Yet Respondents, like the panel, fail to explain why experienced securities professionals would have committed "career suicide" if Rauch had in fact stated "we're nowhere" on the untaped call, as Rauch claimed at trial. (Pet. 19.) In fact, the panel's construction of events, supposedly guided by

2. In reaching its decision, the panel also construed the facts in a way that was unfavorable to RBC based on the record. Several times in the opinion, the panel stated that there was only a ten-minute gap between the last recorded call and the pivotal telephone conversation on March 14. However, that fact was not stipulated, and there was other evidence in the record that suggested that the gap could have been as much as an hour or more. (Pl. Ex. 79, CD894:3.14.04, Tr. 152-53; Pl. Ex. 79, CD894:3.14.05, Tr. 154-56.)

"undisputed evidence," violates common sense, cannot possibly be right, and dramatically illustrates the dangers of improper appellate fact-finding. The jury properly considered all this in rejecting Rauch's testimony and finding that there had been an agreement that was subsequently breached.

D. The Panel's Decision Was Not A Misapplication Of A Properly Stated Rule

1. As previously demonstrated, the panel weighed evidence, drew improper inferences, and did not consider impeachment evidence that favored the non-movant. This was not simply a ruling on an issue of law (Opp'n 18-19) but a reexamination of the facts. Nor is there any basis to conclude that this was an "erroneous" application of an established legal standard. (Opp'n 23.) Indeed, the panel needed to articulate its wholly incorrect "undisputed evidence" standard to reach its improper decision. (Pet. 17-18.) Based on the record, it is clear that the panel fundamentally disagreed with the jury's reasoning. With that as a starting place, there can be little doubt now that the panel set out to toss the jury's verdict under the guise of deciding issues of law. The fact that the panel characterized the issue as one of sufficiency does not alter the fact that what it did was substitute its judgment for that of the jury in deciding there was no breach of contract.

2. Alternatively, Respondents argue that even if the panel was incorrect in its ruling, the Court should not intervene because the ruling was nothing more than an "isolated departure from a well recognized rule." (Opp'n 24-25.) But the evidence suggests otherwise. *See*,

e.g., Eric Schnapper, *Judges Against Juries – Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 354 (1989); Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 Am. L. & Econ. Rev. 125, 125, 127, 138 (2001). Without intervention from this Court, appellate courts have continued to improperly substitute their judgments for those of the jurors. *See, e.g.*, *Brown v. Parker Drilling Offshore Corp.*, 444 F.3d 457, 462 (5th Cir. 2006) (Weiner, J., dissenting) ("We simply cannot sit in our remote, monastic chambers, look only at the record on appeal, then say that these cold facts point so strongly in favor of the [verdict loser] that reasonable jurors could not have arrived at a verdict for the [verdict winner]."). The Seventh Amendment was adopted in order to prevent just this behavior (Pet. 21-23), and this case presents an opportunity for the Court to remind appellate courts of the limits of review and to underscore the constitutional import of the jury's role.

II. Proper Consideration Should Have Been Given To The Trial Court Determinations

1. Contrary to Respondents' arguments, the trial judge examined exactly the issues decided by the panel, and he did so using his "first-hand knowledge of witnesses, testimony, and issues [and his] 'feel' for the overall case." *Weisgram v. Marley Co.*, 528 U.S. 440, 443 (2000) (quoting *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967)); *see also Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947). Presiding at the trial, he was present for all of the testimony and evidence. In denying Respondents' Rule 50 motion, he reviewed the evidence in detail. He also showed the

proper deference to the jury's verdict, which the panel did not. Instead, the panel simply ignored his decision and the jury's verdict, and attempted to duplicate the same feat on the cold record.

2. Respondents also mischaracterize RBC's argument. RBC is not stating that *de novo* review is inappropriate. Instead, consistent with this Court's precedents, the panel should have considered the trial court's decision and given it weight. Respondents attempt to distinguish this Court's decisions on this point to no avail. *Weisgram*, *Neely* and *Cone* all stand for the proposition the appellate court should be alert to and consider the trial court's views on a Rule 50 motion.[3]

3. Respondents argue that even if some deference were appropriate in some appeals from Rule 50(b) decisions, it would not be appropriate in this case. (Opp'n 22.) Casting aside all of the credibility issues and the impeachment of the Schneiders and Rauch, Respondents state that the Court of Appeals was capable of assessing the "unambiguous" Letter Agreement and the communications reflected in the transcripts. Respondents are wrong. The meaning of the Letter Agreement was at issue at the summary judgment stage of the case (Pet. App. 92a, 107-08a) and

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3. Respondents' citation to this Court's decision in *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) is also unavailing. That case concerned the deference to a district court's determinations of unsettled state *law*, not the district court's first-hand experience with the facts of the particular case. *Id.* at 231-40.

hotly contested at trial (Pet. App. 31a-32a) at which there was testimony from both sides on the intent of the Letter Agreement and on its execution (*see, e.g.*, Tr. 363-64, 821-23). The recorded conversations also needed to be weighed in light of the testimony by RBC's witnesses, both factual and expert, that Rauch's words constituted firm offers under securities industry custom and practice.

4. Granting certiorari in this case would afford this Court the opportunity to clarify what the appropriate standard of review should be in this case: *i.e.*, whether it should be abuse of discretion, as argued by Highland,[4] or whether appellate courts should utilize *de novo* review consistent with this Court's rulings to give deference to the jury and some deference to the rulings of the District Court. Whichever way the Court decides, what is clear is that the panel here failed to give any deference to the jury – the true fact-finder – in violation of the Seventh Amendment.

III. The Panel's Ruling Will Have A Negative Impact On The Securities Industry

1. The panel concluded that an agreement on "size" and "price" was insufficient to support the jury's findings of a contract between RBC and the Schneiders. Billions of dollars are traded daily on such agreements and the panel's decision has created uncertainty in the marketplace. Both a prior panel of the Second Circuit and the New York Court of Appeals recognized that the underlying dispute about whether a securities broker

4. (*See* Highland Pet. 22-23.)

like Rauch could bind his principal – something that happens thousands of times a day – was significant to the smooth functioning of the nation's securities markets. The ruling below has opened the door to allow principals to walk away from binding agreements. Granting certiorari would give this Court the added opportunity to protect the securities markets from this uncertainty.

CONCLUSION

For the reasons set forth above and in the petition, a writ of certiorari should be granted.

New York, New York
January 4, 2011

Respectfully submitted,

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APPENDIX

APPENDIX A — TRANSCRIPT OF AN ORAL ARGUMENT BEFORE THE SECOND CIRCUIT, DATED SEPTEMBER 22, 2009

[1] Oral Argument before the Second Circuit in

Highland Capital v. Schneider

08-4630-cv

September 22, 2009

[2] Judge Raggi: Good afternoon. To have joining us on the panel, our colleague from the Southern District of New York, the Honorable Denise Cote. Let me quickly call the cases on today's calendar. I'll note that we have a number of motions, but they're all on submission, so we're going to turn right to the day calendar.

If counsel would just indicate their presence. Highland Capital Management versus Leonard Schneider.

Mr. Schallert: Present for appellant.

Mr. Lackey: Present for appellee.

Mr. McNamara: Present for appellee.

Judge Raggi: Good afternoon, gentlemen. United States versus Brown.

Appendix A

Unknown Speaker 1: Present for appellant, Your Honor.

Unknown Speaker 2: Present for the Government, Your Honor.

Judge Raggi: Good afternoon. Voss versus Mucasi.

Unknown Speaker 3: Good afternoon, Your Honor. We're present for the Government, respondent.

Judge Raggi: And Mr. Vo -- the petitioner is on submission. Garland Sash versus the F -- the Federal Bureau.

Unknown Speaker 4: [INDISCERNIBLE].

Unknown Speaker 5: Present [INDISCERNIBLE].

Judge Raggi: Good afternoon. And Darcy versus Lipman.

Unknown Speaker 6: I'm present for the Government, Your [3] Honor.

Judge Raggi: Thank you. And Darcy is on submission. All right. Let's get started right away. Highland Capital versus Schneider.

Mr. Schallert: Good afternoon. Edwin Schallert on behalf of the Schneider family. Let me start with the provision in the letter agreement that any resale of the

notes was subject to definitive documentation. The subordinated notes were not registered with the SEC but were restricted securities issued by McNaughton in connection with its purchase of the Schneiders' businesses. A resale of the notes would have involved a note purchase agreement. Plaintiff RBC recognized from the outset that the transaction would require documentation prepared by sophisticated outside counsel that would include lawyer opinions and representations and warranties. The parties agreed in writing that any sale would be subject to definitive documentation. Whether that term --

Judge Raggi: The district court thought that that meant that the trade would ultimately be documented but not that documentation was required to establish the agreement. Why don't you tell us why you think that's a mistake.

Mr. Schallert: Because we don't believe the term is ambiguous, Your Honor. We believe we -- that that term, based on the dictionary and many years of case law, has a clear meaning. Any sale of the notes was contingent on completion of [4] a definitive written agreement and that contingency was not satisfied. Indeed, there wasn't even a meeting of the minds as to what if any reps and warranties or opinions of counsel the Schneiders would provide.

Judge Raggi: How do you deal with our decision in the [ph] Consark Corp. case that said that parties can contemplate memorializing their agreement in a formal

document but that doesn't prevent the agreement from coming into effect before the documents are drawn up?

Mr. Schallert: Well, because Consark is very helpful and, in particular, in this case, Your Honor, because of the preexistence of a written agreement that used the term that any resale would be subject to definitive documentation. Indeed, Consark recites the fact that cases going back to the 19th Century under English Common Law used the term "subject to" to mean exactly what it says.

It is -- any agreement is conditioned upon the existence here not just of documentation but of definitive documentation, which in our view precludes the possibility of having an oral contract. Really, the plaintiffs -- first they try to rely on the testimony of the draftsperson which, as a matter of law, couldn't create an ambiguity or couldn't contradict the plain terms of the agreement, but we actually think that the testimony of the draftsperson here, Mr. Holmes, is helpful because he explained that because some of the Schneiders were employed by [5] McNaughton, RBC would require representation that they did not possess inside information. Plaintiffs have also relied below, as they did in the district court. on industry custom and practice. But the fact is that industry custom and practice cannot vary the clear terms of a -- of a contract and here you had a clear written agreement.

Judge Leval: I-I find this case extremely troublesome but for reasons that are not exactly the

same as the ones that you are arguing. It seems to me as -- as one explores this case -- well, it seems to me as if there is a real failure of proof on the part of the plaintiffs that there was a contract for the sale of these securities and this is for several reasons. One of the reasons is that it simply doesn't make sense any way you look at it. We know that the Schneiders knew already several days before, uh, the -- the date of the crucial phone call on the 14th -- was it the 14th of March; is that right?

Mr. Schallert: Yes, Your Honor.

Judge Leval: -- that there was a substantial likelihood because of the takeover the notes would be paid in full and it is a virtual certainty that the Schneiders were not authorizing the sale of their notes at 51 cents on the dollar when suddenly a deus ex machina appeared to -- to offer a high likelihood of a hundred cents on the dollar.

Um, we have a telephone call ten minutes before, which is recorded, in which Rauch says uh, says -- says something that [6] in no way encourages the likelihood that there's -- I forget what his exact words were but it was putting off any expectation of the -- then there's an unrecorded telephone call only ten minutes later, and in the unrecorded telephone call there's a dispute of testimony. But if you look at the three witnesses who testified on the plaintiff's side, not one of them testified that Rauch said anything to the effect that there was a deal to sell the securities. One of them, I think it's Parent, said that it was his understanding after the

telephone call that there was a deal. Well, that is not -- that is not competent testimony putting -- attributing to Rauch words making a deal. The second one, Ambrecht I think it was, didn't even say that much when he was asked, "Was it also your understanding after the call that there was a deal?" He said, "Well, it never came up that we didn't have a deal." I don't know what that means, but it certainly was not -- then the third one, Holmes, is even worse, because while Holmes says that he remembers -- his testimony is that Rauch spoke of agreement with respect to a price of 51. He then adds that Rauch said, "But we can't complete this because we need -- we need more from lawyers about representations and warranties." So, if you take -- what's his name -- Holmes's testimony, it denies that there's a deal. Now, in these circumstances I have a -- a great problem understanding how this can amount to -- how this can support a jury's verdict that a deal to sell at 51 was made on that, um -- [7] or a deal to sell at any price was made on that phone call. But you haven't argued this the way -- the way -- you've argued other things, like the point you were just arguing, that there had to be a writing under the terms of the written preliminary agreement as to -- which I don't find terribly persuasive. But I don't quite know what to make of, um -- of this in view of what seems to me to be this huge gap in the proof of the plaintiffs.

Mr. Schallert: Well, Your Honor, I completely agree with the gap. I think it bears on the second basis from the letter agreement that we do explicitly argue, which is the provision that said that the consummation of any

transaction remains in the sole discretion and satisfaction of the Schneiders, including without limitation as to price.

Judge Raggi: Well, Judge Leval's argument or suggestion to you is that the evidence is insufficient even if the letter agreement doesn't mean what you're saying it means, but that is not an argument you've made. I mean, I don't know how anyone would as -- would understand from your brief that you were challenging the sufficiency of the evidence even on the theory it was submitted to the jury.

Mr. Schallert: Well, Your Honor, we specifically argue that that condition in the contract was not satisfied precisely because there's no evidence that there was ever a communication that the Schneiders had given their approval of all the terms of [8] the contract, including without limitation as to price. We explicitly argue that. Indeed, we cite --

Judge Raggi: But you argue that in terms of whether you could be bound by the agent and things like that. You don't argue that -- that it would be implausible, in fact impossible as a matter of law, to conclude -- to find that they had agreed to it. You argue that these other -- other ways of proving that there was an agreement are deficient, that only they could give their agreement.

Mr. Schallert: Your Honor, I think we've argued that there's a complete failure of proof on that --

Judge Leval: Well, I think -- I think --

Mr. Schallert: -- and that bears -- because it bears directly on --

Judge Raggi: This argument starts at page 43 of your brief.

Mr. Schallert: Yes, Your Honor. Because it bears direct --

Judge Raggi: It's three pages of a 64-page brief. So, do you want to tell me where in the 43 pages you argue that -- that the evidence was insufficient as a matter of law to show that there was any agreement by anyone, not simply Rauch's authority, 'cause I -- I took these three pages to focus on Rauch's apparent authority to find.

Mr. Schallert: Well, Your Honor, we think that bears on [9] the -- the insufficient -- the absence of any evidence that the Schneiders ever agreed to the sale. I mean, that -- that we believe is argument [INDISCERNIBLE]--

Judge Leval: It seems to me your best answer -- It seems to me your best answer to Judge Raggi's question is that the -- is that the evidence of -- the only witness of the three of the plaintiff's witnesses who testified to the content of the telephone call was -- was Holmes and what Holmes said. What Holmes attributed to Rauch was words that related directly back to the requirement of

a writing, because Holmes testified that Rauch said, "We need -- we're going to need, uh, representations and warranties in writing," which, um, relates to your argument that a writing was necessary.

The -- "I will call you back." Rauch -- I'm sorry. Holmes's testimony ends on that point, saying, "I will call," attributing to -- to Rauch these words, "I will call you back and read you specific language about representations and warranties to be inserted in a confirm," and so then the call ended.

"No, you cannot send us a confirm today." I then said, "Can we send you a confirm tomorrow," and he repeated, "I need to talk to the lawyers for the Schneiders; I need -- I will call you back and read to you specific language about representations and warranties." So, that ties to your argument about the need for a writing.

Mr. Schallert: Well, it also ties though to whether the [10] Schneiders ever agreed to sell this and the failure of proof on that. We think we've laid out very carefully exactly what the testimony was on that and the fact that no one testified that Mr. Rauch -- it -- there was never an allegation that he had gone back and checked with each of the Schneiders and each of them was satisfied with the terms of the deal. We say that that is what is necessary to meet that other provision in the letter agreement and there's a complete failure of proof on that. It's -- we agree it's not even clear that there was any agreement, even as between Rauch and the other parties. But clearly there was no -- nothing

that would bind the Schneiders and noth -- no objective manifestation of their consent to any of this.

He didn't even -- it's not even alleged that he falsely said that each of the Schneiders had agreed to each of the terms of the deal, which is what would be required, we believe, under the letter agreement. So, we think that argument has been put before the court in terms of the insufficiency of the evidence.

Judge Raggi: All right. Why don't we hear from your adversary and then we -- I know you want to reserve some time.

Mr. Schallert: Thank you.

Mr. Lackey: Your Honor, Paul Lackey on behalf of appellee, Highland Capital, and also Mr. Michael McNamara has asked to reserve the last three minutes on behalf of RBC. Let me begin directly with your point and a little background to [11] how this case came about, and what the jury heard and the decisions the jury made with regard to these facts is important. What had happened in this case is you had testimony that you had an authorized securities agent, a broker who had bought and sold tens of millions of dollars' worth of securities based on oral instructions -

Judge Leval: I understand that but -- but Holmes testified. Holmes was the only person who testified to what Rauch said and the thing Holmes testified Rauch had said was that it's not wrapped up because we need to get back to you about representations and warranties

that we will need, and when you put that together with the -- with the -- with the clause about -- the clause about -- about a writing, um, that says we don't have a contract. It doesn't says -- it doesn't say we do have a contract.

Mr. Lackey: That wasn't the evidence. That was what the jury believed, Your Honor. The evidence the jury heard --

Judge Leval: I know what the jury believed. The jury gave a verdict.

Mr. Lackey: No, but -- but let me tell you what evidence they heard.

Judge Leval: I'm asking you about --

Mr. Lackey: Yeah.

Judge Leval: -- the sufficiency. How can the jury's [12] verdict be sustained in the light of the fact that the only person who testified to Holmes's words -- I'm sorry -- to Rauch's words says that Rauch said, "We need to get back to you first about the representations and warranties that we will need"?

Mr. Lackey: It's the context of this kind of deal. The way securities are traded, the evidence at trial was that once you reach agreement on price and size, you have a binding agreement. And as a matter of fact, the evidence by -- by Mr. [ph] Guild was that there was a binding deal for RBC to take these as is, that RBC

couldn't have forced any reps and warranties from the Schneiders to finish this deal, that the way these are traded, the custom and practice in the industry is once you reach agreement on price and size you have a binding deal, and I disagree with you that the other two didn't testify they reached agreement. I think Parent Wood and Ambrecht all testified that they reached agreement as to price and size and understood they were bound.

As a matter of fact -- and it's footnotes 58 through 62 in our brief, go through the trial testimony, the transcripts. But as a matter of fact Mr. Peter Parent left that room, called his supervisor at RBC and said, "We have a deal." He then proceeded to call his biggest client, Fidelity, and say, "We have a deal."

Judge Leval: I know, but you've got -- before you've got [13] a deal, somebody on the other side has to say to you, "We have an agreement." And he was on the phone with him and he did not testify to what Mr. Rauch said. The question he was asked was, "What was your understanding at the end of that phone call, Mr. Parent?" Answer: That we were done on the trade, that we could buy the securities at 51. That may mean something, but it's not testifying to what Rauch said, which was the crucial issue.

Mr. Lackey: Well, what he called -- the reason he called, the reason he wanted to be on the call, Mr. Parent said, he wanted to confirm that Rauch had said, "We're done on price and size." And then all the custom and

trade testimony comes in that if you're done on price and size, you have a binding agreement in this industry. And so I -- I believe that what the jury read or believed from Mr. Parent's testimony was he heard Rauch confirm that they were done on price and size. And once you're done on price and size, you have a binding deal in this industry.

Judge Raggi: Counsel --

Mr. Lackey: Yes.

Judge Raggi: -- I wonder if you could respond on the damages issue that -- that's made by -- argument that's made by appellant here that it's really not a measure of damages in terms of the fair market value of the trade but instead a benefit of the bargain analysis.

Mr. Lackey: Absolutely, Your Honor. Initially it's clear [14] that the jury was properly instructed. They were instructed to determine the value at the time of the breach.

Judge Raggi: But the calculation that they arrived at is the one argued by your expert, right? Which is based on giving essentially the interest between March 15th and June 19th --

Mr. Lackey: Right.

Judge Raggi: -- and -- and also the -- the difference between what was paid and the ultimate receipt of value when the bonds were paid in full?

Mr. Lackey: Yeah. There are a couple of very important points on here. First of all, trial counsel for appellants made a decision. They waived privilege to let in the fact that they got this non-public insider information and they stipulated the amount of the interest payments and what were ultimately paid, and they argued to the jury in the closing that on the 14th these notes were worth a hundred cents on the dollar, and so did we coincidentally.

We said that by the time the breach happens on the 20th the notes were worth a hundred cents on the dollar, and it's reasonable for a jury -- you can look on the face and see the interest payments. It's reasonable for a jury to -- to give some sort of interest payments, because these notes were going to get an interest payment, for however long it took to get to a closure on the merger.

So, the fact that they had that evidence in front of them, first [15] of all, it's a decision by trial counsel for the other side to allow this evidence in. They stipulated as to the admissibility and they waived privilege so the jury would hear it and they argued that that was an indication of value on the day of the 14th. And I think that it's within the realm of the jury in a case where there's not a market, these are not freely traded, there's one asset owned by one family and two buyers in the world who are interested in buying them at that time, that the court in Boyce and in Merrill Lynch, this court, has said that you can look at all the possible indicia of value, 'cause it's very hard to determine value for that kind of asset. One of the edition --

Judge Cote: Well, isn't --

Mr. Lackey: Yes.

Judge Cote: I'm sorry.

Judge Cote: Go ahead.

Judge Cote: Isn't the value what the trade value was, what the --

Mr. Lackey: Pub-

Judge Cote: -- arms-length negotiation between the two sides was? Isn't that the fair market value at that date?

Mr. Lackey: No, absolutely not, because by that date you had had dated -- the company had voted to go ahead with the merger, the company had engaged an advisor and the -- and the people who knew this --

[16] Judge Cote: All of that's non-public.

Mr. Lackey: Yeah, well that -- that -- I don't think that matters, Your Honor. In Merrill Lynch this court in 2007 said that you look -- when you're looking at a contract transaction and one party has information the other doesn't, you look to the true value at the date of the breach, and the fact that it's non-public is something that they waived the privilege to let get in the record.

Judge Cote: Even the Schneiders didn't know that.

Judge Leval: How can the true value on the date of the be-breach be par?

Mr. Lackey: Well, that -- that's what they believed it to be, Your Honor. That was the argument at the closing.

Judge Leval: I'm asking you how it can be. It's not a[INDISCERNIBLE].

Mr. Lackey: Oh. Well, because if you're certain -- if you're certain --

Judge Leval: There's no way. If the -- if the acquisition had fallen through, if the acquisition -- it was already -- it was -- this acquisition was on the table, something apparently in negotiation, but another month passed before it was consummated or another how much -- how long passed before it was consummated?

Mr. Lackey: April 16th it was publicly announced, Your Honor.

[17] Judge Leval: Oh, so a month before it was consummated.

Mr. Lackey: But -- but their attorneys --

Judge Leval: So, if it had fallen through there's no way the securities wo -- they would have been back at -- at -- at 51.

Mr. Lackey: But that's why you valuate -- that's why you value it at the time of the breach, Your Honor. At the time of the breach, their own testimony was they were sufficiently certain it was worth a hundred cents on the dollar and debt like this routinely trades for more than par.

If you have interest payments and there's a -- two interest payments and a payout, a hundred percent payout, that often trades at 103 cents on the dollar, 104 cents on the dollar.

Judge Cote: Wasn't the date of breach March 20th?

Mr. Lackey: Yeah, March 20th.

Judge Raggi: So -- so how do you get past that?

Mr. Lackey: Oh, it would --

Judge Raggi: [INDISCERNIBLE] pass and --

Mr. Lackey: You don't get --

Judge Raggi: [INDISCERNIBLE] past that.

Mr. Lackey: You get the value as on March 20th. I'm saying that under Merrill Lynch and Boyce the jury can look at the value, what happened later, because here what happened later is why they breached.

They found out the information that a merger was happening; they [18] realized the value had radically increased. Their own testimony was to 100 cents on the dollar. And a jury is allowed, in determining the value of these things, to say they believe that they'll get paid out and those are in -- those interest payments are part of that payout.

Judge Raggi: Well, the in -- what the jury cannot do though is award the plaintiffs interest earned by the notes post-breach. And to the extent that there appears to be inclusion of interest that the notes earned between breach and redemption and that there -- that this was -- isn't this an error, that it had to be computed from the redemption date?

Mr. Lackey: No. No, absolutely not, Your Honor. This is interest that on the face of the notes get paid until they're paid out. A jury can look at the fact that they're going to get paid interest and then they're going to get 100 cents on the dollar and determine the value is 104 cents on the dollar. Debt instruments trade at those, uh, valuations all the time when there's significant interest payments that the market believes are going to be made. So, what the jury can do, look at the face of the notes and say the family who knows these notes believe they're going to be paid out; they're worth 100 cents on the dollar. That's why they breached.

Judge Raggi: And I'm not sure whether we're talking about the same thing. New York law, the CPLR says that interest on a breach-of-contract claim has to

be computed from the earliest [19] ascertainable date the cause of action existed, and the New York Court of Appeals has indicated that a plaintiff is not entitled to be treated as the owner of disputed stock and awarded damages just because the defendant breached his contract to deliver the shares.

Mr. Lackey: Right.

Judge Raggi: So, my concern is that you were awarded interest between breach and redemption and that doesn't seem to be appropriate.

Mr. Lackey: No. I think that the jury took into account the fact that interest was going to paid as valuing the notes. That's a part of the value of the notes.

You can't get paid the actual interest, but the jury could have come to the conclusion that the value of the notes on March 20th included the fact that they were going to get paid interest in addition to getting paid off. They could have done that by looking at the face of the notes; they could have done that by the testimony. But the ultimate conclusion, the amount they awarded is an amount that you could have valued the notes as of March 20th because there are going to be some number of interest payments before they're paid off in full.

And -- and frankly, I believe, under -- under Boyce and under Delafield you're allowed to look at what happens to some period after the breach if you're looking at determining value at the time of the breach. Debt

instruments like this trade at over [20] par, at over 100 cents on the dollar because of the value of interest payments. So, if you know that this note -- if you believe on March 20th that this note is going to get paid off in full in the next couple of months, you know the value of the note, the 69 million dollars, and you know you're going to get interest payments. So, the value on March 20th is greater than just the value of the note, and that's how that instruments trade in this market.

Judge Cote: Right.

Judge Raggi: Counsel, I just want to make sure I understand something you said moments earlier. You're saying that the defendants conceded at trial that the fair market value of the notes on March 14th, um, was the full value, face value of the notes? Is that what you said?

Mr. Lackey: Absolutely, Your Honor. In their closing the defendants argued --

Unknown Speaker 7: [INDISCERNIBLE].

Mr. Lackey: I'll read you the quote from their closing. The defendants argued --

Judge Cote: Can you give me the page that I can find that?

Mr. Lackey: Yeah. 1640 --

Judge Cote: Thank you.

Mr. Lackey: -- in the transcript. The defendants argued that with that information, manifestly on March 13th the [21] Schneiders received information which would have made it utterly foolish for them to contemplate or sanction or permit a sale of their notes at a 49-percent discount. If the probabilities were that they were going to get a hundred percent in a short period of time if there were a merger and acquisition, why would they have condoned the sale at 49 percent?

Now of course what happened here is they didn't let their agent --

Judge Cote: I don't hear that as a concession that the fair market value on March 14th was the face value of the notes.

Mr. Lackey: No, I believe that's the -- that's an affirmative argument by the defendants that the value of the notes on March 13 March 14th is 100 cents on the dollar.

Judge Leval: How can you say that? How can you say that?

Mr. Lackey: Because they didn't --

Judge Leval: What they said was that the value was -- that -- that it was worth more than a discount of 49 cents on the dollar.

Mr. Lackey: And that's why they pulled out of the deal.

Judge Leval: They didn't say the value was a hundred percent.

Mr. Lackey: Well, that -- they pull out of the deal because they believed the value had radically increased –

[22] Judge Leval: Yes. Sure.

Mr. Lackey: -- after their agent had made a deal.

Judge Leval: But that's not -- that's not what you said. You said the value is 100 cents on the dollar.

Mr. Lackey: Well, they said it would be paid off --

Judge Raggi: And more important, you said you con -- that they conceded that.

Mr. Lackey: -- at a hundred percent. Well, it says they would be paid off. They would get a hundred percent in a short period of time.

Judge Leval: If. Was there an "if" after that?

Mr. Lackey: Yeah, if the probabilities were -

Judge Leval: Yeah.

Mr. Lackey: They said if everybody's [INDISCERNIBLE].

Judge Leval: Yeah.

Mr. Lackey: Well not -- not -- if the merger happens [INDISCERNIBLE].

Judge Leval: [INDISCERNIBLE] -- like that matter?

Mr. Lackey: I think what they're saying is the defendants bel -- or the plaintiffs believed, the appellants believed they'd get 110 dollars.

Judge Leval: You can't pretend words aren't there by not quoting them.

Mr. Lackey: I read you the quote, Your Honor. That's how --

[23] Judge Raggi: You understand you're dealing with, first of all, an argument.

Mr. Lackey: Yes.

Judge Raggi: So, this is not a stipulation at trial. And you're arguing that it is a concession and I think we would expect a lot clearer statement to treat it as a concession. Why don't we hear now in rebuttal from Mr. Schallert -- oh, I'm sorry. That's right. You had reserved some time, Mr. McNamara, correct?

Mr. McNamara: Correct [INDISCERNIBLE].

Judge Raggi: I apologize.

Mr. McNamara: Good afternoon. May it please the court, Michael McNamara, Seward & Kissel, for RBC Capital Markets Corporation. My time is brief, so -- so let me address the couple of points that have been raised and obviously are of interest to the panel.

First, with respect to the sufficiency of the evidence argument, I agree with Judge Raggi that that argument has not been raised by the appellant here.

But with respect to the merits of the argument, Judge Leval, I would direct you to page A240 of the joint appendix in which Mr. Parent is testifying about what happened on the afternoon of March 14th. And -- and just to recall the testimony for you, Mr. Parent -- his client was Fidelity, and Mr. Parent, according to his testimony, wanted to be sure before he went and spoke to [24] his client that there actually was a trade. So -- sorry, I misspoke myself. A209 of the joint appendix -- and he was asked to tell the jury everything he could remember about the conference call.

Judge Leval: Wait. I'm sorry. Let me just get the page number. Hang on.

Mr. McNamara: Sure. It's on A209. It's page 151 of the trial transcript.

Judge Leval: A-A209, and what - what page of the trial transcript?

Mr. McNamara: 151, Your Honor. It's the --

Judge Leval: 151.

Mr. McNamara: -- lower left-hand page.

Judge Leval: Okay.

Mr. McNamara: And it's the second answer. He says, "I remember I was sitting in the office. I remember where Kenny was sitting, where Max was sitting and that Glenn Rauch," who was the agent, Your Honor, for the Schneiders, "confirmed size and price with us, 69 million at 51," which means that we had a transaction.

So, he put the words, Your Honor, in the agent's mouth. He said that the agent said that during the trial and that is enough to support a jury verdict. That is far beyond mere surmise, sheer surmise; that's not speculation. There was enough there --

Judge Leval: Let me ask you further.

[25] Mr. McNamara: Sure.

Judge Leval: I appreciate your pointing that out to me, which certainly is illuminating. But let me ask you further about an argument your colleague was making --

Mr. McNamara: True.

Judge Leval: -- and which I think you're relying on too, um, which is about -- about industry practice, meaning that price and size is all you need to agree on to have a -- to have a transaction.

Mr. McNamara: Right.

Judge Leval: Is that correct?

Now assuming that the representation is correct that the -- that the evidence does show testimony to the effect that in the industry for securities transaction an agreement on price and size is all you need, isn't it nonetheless the case that -- that this particular deal had this particular language about "The transaction is subject to definitive documentation," and that when you put -- and that is not characteristic of the industry practice that you were talking about?

The industry practice doesn't -- this deal about the written contract, saying "subject to documentation" is not customary for securities transactions, and I am wondering whether, when you put that language together that any transaction is - is subject to definitive documentation -- when you put that together with Holmes's testimony that, um, that Rauch said, um, we -- "We need [26] to get back to you about representations and warranties that we will need," why that doesn't prove that there isn't a -- a contract, notwithstanding agreement on price and size.

Mr. McNamara: Your Honor, I think that the district court and the jury got this just right. I think that the district court in analyzing this question decided that the issue of whether the essential terms of the agreement were price and size was one for the jury. That's a determination the district court made back in July of 2005. It had been made prior to the first time this case was here.

Now, ultimately that question went to the jury. There was evidence of industry custom and practice both by the expert as well as by RBC witnesses who testified about it, that the phrase "subject to definitive documentation" in compliance with applicable law -- there was extensive testimony about what that meant and how it got in there.

And critical in that trial testimony was that the phrase was inserted by Mr. Holmes and it was inserted in - in order to make it clear to the other side that because these were unregistered notes as -- as our opponent has told the court today, there was going to have to be some documentation, not a written agreement. There was going to have to be some documentation.

Judge Leval: What do I do with Holmes's testimony that Rauch said, "We need representations and warranties of -- of as yet uncertain -- as yet unspecified" –

[27] Mr. McNamara: Well, respectfully, Judge Leval, I think you -- you follow the jury's determination on this,

that the jury determined and properly so that the essential terms of the agreement had been reached and that the other terms were non-essential.

And indeed there was testimony by our own expert that based on that conversation we may very well have an "as is" agreement. In other words, whether we wanted representations or not, we might not get them.

Judge Leval: Well, she was asking me for the representations, not you.

Mr. McNamara: No. I I - I understand that. I understand that he said there was going to be representations but that the jury could properly find there was an agreement and that once we start talking about representations and warranties we're now at the settlement stage. We're past the point where the -- where the essential terms of the agreement have been reached. And that's what the jury determined and there's a factual basis in the record for that determination. I see I'm out of time. I would like to address the -- the valuation issue and the -- and particularly the July 19th issue but -- if you'd indulge me for just a moment.

Judge Leval: I think -- I think we should hear what you have to say.

Judge Raggi: Hear you, yes.

[28] Mr. McNamara: Yeah. I -- let me take the July 19th issue first of all. The -- the record makes clear that there was no confusion by this jury, that this jury, as Judge Leisure, who's been sitting on the district court for a long time as he says and before that practiced in that court for a long time, was one of the most intelligent juries he had. They understood this case and they brought their common sense to bear on what was going on in this case.

In the closing Judge Cote -- Mr. Lackey said the breach could be on March 14th, the breach could be on March 20th. "I don't want pre-judgment interest from that date; I want pre-judgment interest from June 19th," and I think that when you look at this you have to bear that in mind. That's an important thing. It was a concession, simply that.

I don't think the jury was confused about when the breach took place.

In terms of -- in terms of what the evidence was that would support it, there was not only the evidence of what happened to the notes, more importantly there was all the evidence of what the lawyers and the Schneiders thought the value of the note was on the day of the breach. And under this court's precedence you are allowed -- particularly when we're talking about a security that's not traded on a regular market, the jury is the finder of fact with regard to valuation. They can take any relevant evidence.

[29] Judge Leval: But why -- why did -- why did Judge, uh, Leisure, instead of charging market value, charge value and why value is -- I mean, all these terms are a little imprecise, but when -- but value is so much more subject to differing meanings than market value.

Mr. McNamara: Well, Judge Leval --

Judge Leval: And value invites the jury to, as seems to have been the case here arguably, to use face value rather than market value.

Mr. McNamara: Oh, no, I don't think -- I don't think they used face value. That would suggest this jury was confused. This jury understood what was going on here. They heard the evidence carefully; they understood the var --

Judge Cote: Isn't the calculation that they did in awarding damages simply based on the face value and subtracting from the face value and adding to, um, the -- the intervening interest in those few months? Isn't that the calculation and isn't that the calculation that your expert argued to for them or supported through his testimony?

Mr. McNamara: Well, it -- it's certainly the case that that is a -- a full measure of damages but I don't know how they calculated it. They weren't asked to -- to -- to provide a verdict sheet on that as to how they -- how they determined it. They could have determined it --

Judge Cote: So, it was just randomly that that's how it [30] added up?

Mr. McNamara: No, I think they believed that RBC and Highland were entitled to those damages. I -- I think that since our theory and -- and let me just leave you with this point then, Judge. I think this case is different, it seems to me, than a case where there was a breach and at the time of the breach it was uncertain as to what would happen and then by some happenstance later on the notes wound up being worth far more money. That -- that's not what this case was about. This case was about material, non-public information causing the breach. That's why the Schneiders reneged on the trade. That's how the R -- how RBC was harmed in consequential damages.

Judge Raggi: But that's separate from the question of now what damages to award. Let -- let me make sure that I haven't misunderstood your argument. I had thought that the plaintiffs had actually, um, used face value at -- as the amount of damages that should we be awarded by arguing to the jury, by presenting evidence that the defendants were informed in March of 2001 that the notes likely would be redeemed at face value and that's how the link between face and market value, if --

Mr. McNamara: That -- that's true.

Judge Raggi: -- that's what we're looking for, came to be presented to the jury.

Appendix A

Have I misunderstood the record?

Mr. McNamara: No, you have not misunderstood the record. [31] That -- that is correct. What -- one last comment on your question and I'm -- I'm sorry to jump around but I was asked a question in the meantime.

You asked about the market value. I think if Judge Leisure had charged the market value, it would have been an invitation to the jury to award no more than the difference between the 52.50 and the 51 cents. And the problem with that is it essentially would have directed them not to take into account what the defendants knew at the time, which was relevant evidence that they properly had before them.

Judge Leval: What was the evidence -- what was the evidence with respect to the likelihood that the acquisition of McNaughton by Jones would be consummated? It seems to me that the evidence, although I -- I obviously don't have great detailed knowledge of the record, but it seems to me the evidence was rather sketchy with respect to what was going on in this acquisition.

The -- it was clear that -- that -- it was clear that the Schneiders, um, had an understanding, that they heard that this acquisition was in the works and if it came through they had a good expectation of being paid off in full on the face amount of the notes plus interest. But -- but what was the evidence of certainty that, um -- that that, um -- to the effect that it was certain that

that acquisition would take place, because there are lots of acquisitions that are discussed and they -- and they [32] are contemplated and then for any of a billion reasons they fall through and if that had happened the -- any expectation of full payment on the notes would have gone up in smoke.

So -- so, what is the basis of saying -- what can be the basis of saying that as of the date of the breach, which is -- still is a month short of the consummation of the acquisition, what was the evidence to show that uh - that the value of the notes was full face value plus interest at that time?

Mr. McNamara: We -- we've cited in our briefs, Your Honor, um, several of the statements by the Schneiders at around the time of the breach, but let me just cite to one --

Judge Leval: Yeah.

Mr. McNamara: -- while I'm here. And this is at joint appendix 414. This is Leslie Schneider testifying about the events of March 13th and she's talking --

Judge Leval: Hang on just one second.

Mr. McNamara: Sure.

Judge Leval: 4 4 - 414, and what transcript page?

Mr. McNamara: 939.

Appendix A

Judge Leval: 939.

Mr. McNamara: And you'll see in her second answer she's describing a meeting with the lawyers and in the second sentence she says, "They told us that most likely it was a merger acquisition." And then if you skip down a little bit they -- she says, "And they told us, you know, that they felt very [33] strongly that the notes would be paid out in full. So, on March 13th we were very excited." And then, a little further down, Judge, on page 940, she goes on to say, "I think they just told us what they believed was in fact going to happen." So, there is evidence in the record that prior to the time of the breach that the Schneiders and their lawyers felt very strongly the notes would be paid out in full. This evidence was all provided to the jury and I should note also that with respect to --

Judge Cote: Now -- now, counsel, I -- I've read each of the transcript cites that are cited in your brief and I think the best that -- this is the March 13th meeting in the lawyers' office, right?

Mr. McNamara: Right.

Judge Cote: They -- the Schneiders weren't -- weren't even told the name of the acquiring company, right, as of March 13th?

Mr. McNamara: Yeah. Based on this testimony that's right.

Judge Cote: Right. Ba -- well, based on the trial testimony. And -- and so, what we have here is some hopeful speculation and, I mean, that meeting at the lawyers' office was about lots of issues. This was only one item on the agenda. There was some speculation. People were hopeful. If it did go through, if something happened, it would probably result in [34] notes being paid in full, um, but -- but that's -- I mean, there were -- there was nothing concrete communicated at that meeting.

Mr. McNamara: Well, I -- I --

Judge Cote: Is that fair?

Mr. McNamara: Well, I -- it is true that there was no -- as far as we know, no definitive agreement that day. It's also --

Judge Cote: No. I mean, and communicated to the Schneiders beyond that.

Mr. McNamara: Well --

Judge Cote: They even knew -- they did not know the concrete details with respect to the negotiations between the acquiring company and the -- and -- and their former company, McNaughton.

Mr. McNamara: Well, they were told that day, according to the lawyers who had spoken to the lawyer for McNaughton, that they felt very strongly the notes

would be paid in full and -- and that evidence was before the jury and it could properly take that into account.

And -- and the other -- one other point that I don't think has been mentioned. There's been a lot of talk about the evidence that came in on damages and -- and the calculations by the expert, Mr. [ph]Gall, I point out to you that in fact the other side stipulated to those mathematical computations. This isn't [35] a case where they sought to keep out the evidence after March 20th. There was no motion in limine to try to keep that evidence out. That evidence came in in part by their own hand and now they say, well --

Judge Leval: But what does that have to do with whether it's the appropriate measure of damages?

Mr. McNamara: Well, it goes -- because now they're arguing the jury -- the jury verdict was tainted by that and what I'm saying is the jury properly could take into account any evidence that was presented to it. That's what this -- this court --

Judge Raggi: I'm not sure how that applies to awarding post-breach interest.

Mr. McNamara: Well, I -- I think on --

Judge Raggi: New York law [INDISCERNIBLE] to contemplate.

Mr. McNamara: Well, to -- just to come back to that, I -- I think of that. We could have asked in closing that interest be awarded as of March 20th. Instead the request was that interest be measured as of June 19th and that the interest that was already in the notes be paid.

Now, the reality is -- I don't think there was testimony on this, Judge, but in setting the value of the notes, of course you would take into account the interest stream and that's why, as Mr. Lackey said, there are bonds that trade over par in the [36] marketplace, in part because there's an imbedded interest payment.

Judge Raggi: But to the extent that there may be an error in the jury's award of interest between breach and redemption or after redemption, why isn't that something that would require an adjustment either by way of remititor or otherwise?

Mr. McNamara: Frankly, Your Honor, I think there's support for the jury's conclusion. If the question were is -- are we prepared to live with a remititor that reduced the interest payments, the answer is we absolutely are.

Judge Raggi: I mean, that's a small point relative to everything else we've heard today.

Mr. McNamara: I --

Judge Leval: Was there ever --

Mr. McNamara: I think I'm authorized to stipulate to that here, Your Honor.

Judge Raggi: Okay.

Judge Leval: Was there evidence that -- was there evidence that the interest was above market interest?

Mr. McNamara: No, there was not and I think as a practical matter, given the -- the nine percent that Judge Leisure properly awarded under the CPLR, I actually think that my clients and -- and Highland Capital were the losers on that, Judge. I think it's --

Judge Leval: No. I'm -- I'm talking about something [37] different.

Mr. McNamara: I'm sorry.

Judge Leval: I'm talking about --

Mr. McNamara: I -- I misunderstood you.

Judge Leval: I mean, isn't it correct that when notes will sell on the market for more than their face value because of the interest -- not just because the notes pay interest, it's because they have an interest rate that is higher than the market rate of interest, which makes them more valuable than -- than notes at the regular market rate of interest of the particular day and thus more valuable than their than their face amount?

Mr. McNamara: Well, I -- I suppose that's right. I think if -- if a trader concluded that the face value of the notes was likely to be recovered in a short period of time and there was interest payable as well, I guess those markets would trade [INDISCERNIBLE].

Judge Leval: My question pertains to Judge Cote's questions addressed to you about the justification for the jury's awarding an amount that seems to correspond to the interest that was actually paid until the consummation of the merger.

Mr. McNamara: Well, the jury had those numbers before them, Judge. I mean, they -- as I said, they went in without objection. I mean, there were objections to some of the [38] testimony but the mathematical computations were -- were in the record and -- and the jury could properly find that that was part of the damages.

Judge Raggi: All right. I think you've made that point to us before and we've kept you way over your time. Let's hear --

Mr. McNamara: I thank you very much for your time..

Judge Raggi: -- from the adversary in rebuttal. Thank you.

Mr. Schallert: Thank you, Your Honor. On damages the plaintiff's damage expert calculation was based on

the value of the notes on June 19th, three months after the breach. The interest that was earned post -- post-breach through June 19th is just further evidence that they were using June 19th, 100 cents on the dollar, as the value of the notes. That's the improper measure of damages under New York law. It should be determined at the time of the breach and should be determined at the time of the breach based on market value, not based on material non-public information and, in fact, the best evidence of market value with non-standardized securities like these is the willing buyer willing seller test and we have that in spades here with

Judge Raggi: Let me interrupt you.

Mr. Schallert: Yeah.

Judge Raggi: 'Cause those are two separate points about [39] what -- what the value is going to be at breach and then whether interest gets awarded --

Mr. Schallert: Yes.

Judge Raggi: -- after breach. Focusing on value at breach, you heard me ask your adversary about whether the basis for their argument that they were entitled to get fair market value as the -- as the award was based on their argument to the jury that the parties were told that redemption would likely be at -- at -- I'm sorry -- face value. I misspoke when I said fair market value. Face value.

Um, why don't you tell us why you think it would have been error for the jury to have accepted that argument?

Mr. Schallert: Because that -- that -- it's material non-public information that the notes were going to be paid out at full. The 52 1/2 cents that three sophisticated financial institutions bargained for on -- right around this very time, March 14th, shows that that was the true market value. That's the willing buyer willing seller test, 52 1/2 cents. It's not 100 cents on the dollar.

The only way you can even -- and you wouldn't get to 100 cents on the dollar even if you consider the inside information for the reasons Judge Leval gave. There was all kinds of un-uncertainties associated with it. So, even if you were to consider the information that the Schneiders had, which you shouldn't because that's not part of market value. By [40] definition material non-public information isn't.

Judge Raggi: But that's -- what you might argue to a fact finder --

Mr. Schallert: Right.

Judge Raggi: -- is different from the argument you're making to us now, which is that no reasonable fact finder --

Mr. Schallert: Right.

Judge Raggi: -- could have used face value as a, um

—

Mr. Schallert: That's right.

Judge Raggi: -- measure of market value.

Mr. Schallert: Because there -- because of the two settled legal propositions that this court has repeatedly applied, which is that you have to use the damages to determine at the time of the breach and determine by market value And here the best evidence of market value supplied by the willing buyer willing seller test is the 52 1/2 cents, and that's a 55 1/2 million dollar issue in this case and I'm so grateful that the panel is not losing sight of that.

But I also wanted to return, Your Honor, to your original question, because we think we have argued the absence of evidence. We --

Judge Leval: Sorry. Will you explain that, the 55 million dollars?

Mr. Schallert: Yes. The 55 1/2 million dollars is -- well, that -- the 56 1/2 million is the -- is the total amount [41] of so-called benefit-of-the-bargain damages. But if you take the difference between the 52 1/2 cents and the 100 cents and you take that interest and all, that's, uh, 55 million out of that 56 1/2 million.

Judge Leval: You mean, you're arguing that the fair market value was the -- was the -- was the value -- was 51, the value that arguably was agreed to on the telephone call?

Mr. Schallert: 51 would have been the market pri -- it would have been the contract price. We're saying -- we're prepared to concede that 52 1/2 cents, which was negotiated by the three sophisticated institutions in an arm's-length transaction, would have been the market value. That difference is a penny and a half on each share of the notes.

Judge Leval: Now, um, Jones, the Jones Company, would certainly have had an interest in buying these notes at prices considerably higher than 52 cents if it was going to be acquiring McNaughton and undertaking a -- an obligation to pay 100 cents on the dollar. Does that figure into market value?

Mr. Schallert: Well, again, a perfect example of how an objective test is the one that's used, not a subjective individualized frame of reference. In other words, don't -- you don't base market value on what -- a particular purchaser who may have access to inside information, which they certainly would have had; you base it on market value, which is not a subjective individualized reference. And here the objective [42] evidence is what sophisticated financial institutions in an arm's-length transaction agreed to.

Just to get back to Your Honor's original point, we think we have argued the absence of evidence, both in our opening brief and in our reply brief. For instance, there's a heading in our reply brief at page 19, "Absence of Schneiders agreement to the sale," and I apologize if we confused the issue because what we did --

Judge Raggi: And I thought that that was -- when I read the briefs --

Mr. Schallert: Yeah.

Judge Raggi: -- I thought that was all part of your argument that only the Schneiders and not Rauch had authority to agree to this deal and to the extent that the jury would have thought that Rauch did have the agreement, and you don't persuade us that as a matter of law he didn't. We're not looking just at what the Schneiders did; we're also looking at what Mr. Rauch did --

Mr. Schallert: Right.

Judge Raggi: -- and considering evidence such as what Judge Leval alluded to, what Mr. McNamara pointed us to. So, the fact that the Schneiders didn't agree doesn't -- is -- does not seem to me to be a sufficiency argument. It seems to be a -- a variation on your argument that Rauch didn't have the authority to bind them.

[43] Mr. Schallert: Because, Your Honor, what I think is distinctive and what in effect removes the need to sort through a good deal of the factual evidence here is the existence of the written agreement, the letter agreement, because the letter agreement says that the consummation of any transaction remains in the sole discretion and satisfaction of the Schneiders, including without limitation as to price, which means not just as

to price but as to all the terms. That's why if you take that provision and combine it with the state of the record, which is that not even Rauch purported to say that the Schneiders had signed off.

In the -- in -- first of all on the 12th, 13th and the 14th he says, "I'm still trying to get hold of the Schneiders and their counsel." So, it should be manifest on the basis of that record that -- that there was no manifestation of the satisfaction of the Schneiders to all the terms of the deal, including without limitation as to price. So, no matter how you parse that March 14th call, no one even says, no one even alleges that on that March 14th call Mr. Rauch said, "By the way, I've checked with all the Schneiders and each of them is satisfied with all the terms of the deal, including representations of warranties and opinion of counsel." In fact, there was never even a meeting of the minds on all those provisions.

So -- so, Your Honor, I think the letter agreement provides the context for analyzing the rest of the evidence. That was the [44] point we were trying to make. But I think we've laid that out in -- as carefully as we can and in as balanced way as we can as to what the state of the record is on the lack of an agreement there.

Judge Raggi: Well, am I correct that nowhere in your brief do you cite what I would view as the classics, um, law that would alert us to the fact that we had a sufficiency question, which is whether any reasonable jury could have found this -- could have returned this verdict on this evidence. That's -- that's nowhere seen.

Mr. Schallert: Right. We -- we did not make -- make the argument in those terms, Your Honor. What we say is because there was no evidence of any agreement between the Schneiders, that was manifested to the Schneiders, you combine that with the letter agreement, there could no -- in no way be a satisfaction of the condition in the letter agreement. And the same thing with the definitive documentation.

Judge Raggi: All right. Well, we thank you for your argument. We do have other cases today.

Mr. Schallert: Thank you, Your Honor.

Judge Raggi: So, we'll take this matter under advisement.